IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965

NO. 382

FRANK J. PATE, Warden,

Petitioner,

vs.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

(On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit.)

BRIEF FOR PETITIONER.

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CITATIONS.

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BRIEF FOR PETITIONER.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported at 345 F. 2d 691.

JURISDICTION

The opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit were entered May 3, 1965. The petition for *certiorari* was filed on July 22, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1) Whether the issue of an accused's sanity at the time of the crime raises a federal constitutional question cognizable on federal habeas corpus?

2) Assuming the question of one's competence at the time of the trial is cognizable in a federal habeas corpus proceeding:

(a) Whether that issue was waived by the defendant's failure to raise it at the trial?

(b) Whether the evidence at the state trial on that issue required the Trial Judge on his own motion to empanel a jury to determine respondent's present sanity.

3) Assuming that hearings on the question of respondent's sanity at the time of the crime and sanity at the time of the trial should now be held, whether they should be held in a state or federal court?

CONSTITUTIONAL PROVISION INVOLVED.

Constitution of the United States, Amendment XIV provides in pertinent part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT

The respondent, Theodore Robinson, was indicted on two counts for the murder of one Flossie May Ward (R. 18). He waived a jury trial and pleaded not guilty to the charge. A trial ensued in the Criminal Court of Cook County, Illinois. (R. 21, 22). The judge found him guilty and sentenced him to life imprisonment. (R. 165). A writ

of error was taken to the Illinois Supreme Court, which affirmed the conviction in *People* v. *Robinson*, 22 Ill. 2d 162, 174, N. E. 2d 820, *cert. denied* 368 U. S. 857 (1961). Thereupon the respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. On May 27, 1963, the petition was denied on the authority of the Illinois Supreme Court determination. (R. 16). He was granted a certificate of probable cause by that court and appealed to the United States Court of Appeals for the Seventh Circuit which reversed the order of the district court and remanded the cause for a hearing on the issue of Robinson's sanity at the time of the crime and on the issue of whether due process required the Judge on his own motion to hold a sanity hearing on the issue of his competency at the time of the trial. (R. 180). This Court subsequently granted certiorari. (R. 183)

The transcript of respondent's trial was introduced in the habeas corpus proceedings and shows the following facts were established at his trial:

The crime.

The respondent, Robinson, and the victim, Flossie May Ward, were living together in a common law status. (R. 35, 136). The victim was employed at the Collins Barbeque House at 1035 East 63rd Street in Chicago. (R. 38, 61). She worked a shift which began at 10:00 P. M. and ended at 4:00 A. M. (R. 39) or 5:00 A. M. (R. 61). The respondent would stop in at the barbeque house during these hours for meals about three or four nights a week and often came and picked up the victim after her work shift had ended. (R. 42-43, 62)

On February 25, 1959, the victim, another witness by the name of Neddie Batts, and a cook, Jim Paul Hackman,

were working behind the counter when Robinson entered the barbeque house wearing a blue coat and a brown hat. (R. 46, 67). He rushed in and jumped over the counter (R. 49, 64). The victim said to him "Ted, don't start nothing tonight." (R. 44, 69). Robinson laid his hand on the counter and a gun was visible in his grasp. (R. 70). Neddie Batts and Jim Hackman each heard shots (R. 44, 64-66) and Hackman noticed that the gun was pointed toward the victim (R. 66). Miss Ward, who was by the front of the establishment, jumped over the counter. (R. 44). Robinson then leaped the counter and chased her out of the front door. (R. 44). The victim was subsequently found dead (R. 34), on the sidewalk in front of the barbeque (R. 93) and the cause of death was established to be a gunshot wound in the head. (R. 124)

Respondent's arrest.

On the following day Robert Moore came to the apartment of Officer Starr who lived in the same building with him at 141 N. Wolcott in Chicago and told him that he had just received a call from his mother telling him that she had received a call from the respondent's mother telling her that respondent had killed the victim and a Reverend Elmer Clemens. Moore said that Robinson was then in Moore's apartment and asked Starr to go up and arrest him. (R. 80, 81).

Officer Starr called and asked for additional officers. He met Officers Kerfman and Elsoos in the lobby and they went up to Moore's apartment on the thirteenth floor. (R. 81) Upon their knock a woman answered the door and answered that Respondent had just left. (R. 81.) They then realized a man standing in the hallway who they had first seen when they got off the elevator was Robinson. (R.

81, 89). While Officer Starr was in the apartment, the other officers had had Robinson in vision (R. 90). They went up to him and asked who he was. He admitted he was Theodore Robinson and he was placed under arrest. (R. 82)

About an hour or an hour and a half after the arrest, Officer Starr went to the Moore's apartment with Officer Creed. They, together with Moore and his wife, found a navy blue overcoat and a brown felt hat in the Moore's closet. The overcoat had a .25 Colt automatic wrapped in a white handkerchief in the inside pocket. (R. 82-83). Robinson subsequently admitted the clothes were his but denied ownership of a gun. (R. 85) The gun was identified at the trial as the weapon which fired the fatal bullet. (R. 119, 123).

Respondent's mental condition

After the State had closed its case which established the before-mentioned facts, the respondent introduced his evidence. This testimony did not relate to the happenings on February 28, 1957, but was limited to evidence of his mental condition.

This evidence tended to show that the respondent was a normal child until he was about seven or eight (R. 131, 144). At that age he was hit on the head with a brick dropped from a third floor. (R. 131.) Thereafter he acted "a little peculiar", complained of headaches and appeared "cockeyed" (R. 131), although no unusual circumstances occurred until he entered the army. (R. 131.)

Once when he was in the service he came home on furlough. His mother prepared dinner for him and his girl friend. He was sitting down and talking with the girl when he jumped up, ran to a small bar in the apartment

and kicked a hole in it (R. 132, 141), after his mother refused him some money he requested. (R. 165).

After he returned from the army he usually had a glare in his eye and seemed to be lost in deep study most of the time. (R. 132-133). He often helped his grandfather painting. While he was working he would sometimes leave the job in what seemed to be a daze without saying anything and come back in two or three hours in good condition. (R. 144). Once he had a fight with his wife, took her clothes out in the yard and was going to burn them before he was stopped. (R. 144, 145.)

During 1952, he went to his aunt's house and complained that someone was trying to shoot him. His mother was called and when she came he fought to keep her from entering through the door. He had a "starey look and seemed to be just a little foamy at the mouth." (R. 133). The police were called and he tried to keep them from entering. He was taken to a Veterans' Hospital, sent from there to a county hospital, and was finally admitted to Kankakee State Hospital, a mental institution. (R. 133-135, 150-151).

The Kankakee Hospital Report on his mental condition at this time states:

> "Was drinking and went to the Psychopathic Hospital. He imagined he heard voices, voices of man and women and he also saw things. He saw a little bit of everything. He saw animals, snakes and elephants and this lasted for about two days. He went to Hines. They sent him to the Psychopathic Hospital. The voices threatened him. He imagined someone was outside with a pistol aimed at him. He was very, very scared and he tried to call the police and his aunt then called (fol. 272) the police. He thought he was going to be harmed. And he says this all seems very foolish to him now. Patient is friendly and tries to cooperate." (R. 164).

He was released. (R. 161) Subsequently, he and his wife were separated. He shot his child and shot himself in the head and jumped into a lagoon. Later he went to a police station and surrendered. (R. 148, 153-156.) For this crime he was convicted and sentenced to the Illinois State Prison at Joliet. (R. 136.)

He was released in 1956 (R. 136). Thereafter his mother had a warrant for his arrest issued because he was fighting so much. (R. 136-137.)

Four witnesses, his mother, his grandfather, his aunt, and a friend of the family, testified that in their opinion he was insane and unable to distinguish right from wrong. (R. 138, 142, 146, 157.)

In rebuttal, there was a stipulation entered into between counsel that if Dr. William H. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called he would testify that he examined the respondent in June of 1959 and that in his opinion Robinson knew the nature of the charge pending against him and was able to cooperate with his counsel in the defense of those charges. (R. 160, 161.)

Colloquies concerning the calling of witnesses.

After the close of respondent's case his attorney stated to the court that Robinson was concerned about the subpoenaing of certain witnesses whose names were on the witness list. The attorney stated that they had investigated them and did not believe their testimony would add anything to the respondent's case but that respondent wished everyone to testify. (R. 126). At that point the following colloquy between Robinson and the court occurred:

> "The Defendant: Judge, your Honor, they were on the State's witness list and the State said they had

several witnesses. They produced two. For what reasons, I don't know, but I am on trial here and I would like to be given every consideration and I would like—

"The Court: You will get every consideration.

"The Defendant: I would like that the court be adjourned until tomorrow morning.

"The Court: No, sir.

"The Defendant: To give me time to confer with counsel for the calling of witnesses.

"The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

"The Defendant: I thought it was by agreement. When I saw him I told the lawyer we weren't ready now.

"The Court: No, sir. Who are the witnesses you want?

"The Defendant: I don't have the list; if I could see the list.

"The Court: Get the list. Who are the witnesses?

"Mr. Conley: I am handing our list of witnesses to counsel now.

"Mr. McDermid: And I am handing this to Theodore Robinson so that he can satisfy himself at this time.

"The Defendant: I am unfamiliar with any of those names who names appear on that list.

"The Court: Which witness do you say that you want?

"The Defendant: I understand that there was other people present besides the one that was presented here to the Court.

"The Court: Well, who are they?

"The Defendant: I do not know by name.

"The Court: "If you don't know them—

"The Defendant: I couldn't tell by looking at the list here because I do not know the names of the people on the list.

"The Court: If you will tell your counsel what witnesses you want—

"The Defendant: If the State has a list of the ones, the witnesses, that they didn't call, I would ask the State's Attorney to familiarize me with the list.

"The Court: Is this the complete list?

"Mr. Conley: Excuse me, Judge. There were witnesses that were not called in this case, one of which could not be found. That is—

"The Court: Who was that?

"Mr. Conley: A Miss Butler. And a Mary Lou Collins, I understand, was served but she left on a plane for California yesterday around noon, so she is not available. And, of course, the one who can't be found is not available. However, they would be State's witnesses and there is nothing that I would like better than to have those two people here. The other witnesses who were not called were police officers, partners of the officers that testified and their evidence would only be cumulative and similar to the testimony that has been heard already.

"The Court: Which witnesses do you want to call?

"The Defendant: The witnesses that testified here for the State said there was six or seven, eight some people present there at the time and whoever those people are, I mean if they were present at the time they arrived, the investigating officer arrived at the scene of the crime—

"The Court: Do you have the list of witnesses that were in the restaurant at the time of the shooting?

"Mr. Conley: Yes, Maxine Butler, the one which I referred to already.

"The Court: Is that the one who went to California?

"Mr. Conley: No, sir, that is the one who hasn't been found.

"The Defendant: I am talking about the patrons, the people they say—

"The Court: That is what I am talking about.

"Mr. McDermid: My investigation has not been able to turn up the names of any of the patrons that were in the place.

"The Court: Do you have the names of the patrons, Mr. State's Attorney?

"Mr. Conley: No, sir, we don't.

"The Court: Do the police have them?

"Mr. Conley: I don't think they have, Judge.

"The Court: Is Breckenridge here? Get him out here.

"Mr. Conley: The police naturally were interested in finding as many witnesses as possible, and I am convinced that this list of witnesses includes all that were found, including the names and addresses of them.

"The Defendant: Also, Judge, your Honor—

"The Court: Officer Breckenridge, did you get the names of the patrons that were in the restaurant at the time of the shooting?

"Officer Breckenridge: No, all of them fled, your Honor.

"The Court: They were not there when you arrived?

"Officer Breckenridge: No, sir.

"The Court: What else do you want, Mr. Robinson?

"The Defendant: Well—

"Mr. McDermid: May I say, your Honor, to the witnesses and one of the witnesses I did speak with was May Lou Collins, one of the persons listed here

who apparently is now in California, and it would not be in my judgment that she would be helpful in this matter in any pertinent degree and that she told me that she did not see the occurrence.

"The Court: Very well. Anyone else you want, Mr. Robinson?

"The Defendant: Well, I asked the attorney yesterday to subpoena Mr. and Mrs. Robert Moore.

"The Court: What do they know about it?

"The Defendant: In whose apartment I was arrested in, I mean arrested near.

"The Court: What will they testify to?

"The Defendant: Well, I do not know, sir, but I would like to have them subpoenaed in court.

"The Court: We can't subpoena people unless you tell us what they are going to testify to.

"The Defendant: Well, the police are contending that the clothes they have found in Moore's apartment was mine. That is the reason at the beginning of the trial, I asked the attorney to have a pretrial preliminary to determine the admissibility and the validity of the evidence that the State was intending to use against me.

"The Court: Let's hear the rest of the evidence and we will decide on that. Let's proceed with the trial.

"Mr. McDermid: May I say for the record, however, that I do not recall him asking me to subpoena the Moores in yesterday, and I think that you will have a chance to talk to Mr. Warren Carey in a few minutes again and he will be able to satisfy you.

"The Defendant: The court was recessed and I asked him to come back and he didn't. He failed to comply.

"The Court: Let's proceed. At the recess for lunch, you can talk to your lawyer then.

"The Defendant: All right."

(R. 126-130.)

Again after the sentence had been pronounced, Robinson had the following colloquy with the court:

"The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

"The Court: Yes, sir.

"The Defendant: As you know, I asked the Court about the witnesses that the State had that appeared —that appeared on the list. My lawyers had previously showed me the witnesses to that extent, and, I have checked the list. I mean I see that the list is mostly police officers. Well, here the police introduced evidence of some clothes belonging to mine and I was told by the Court before going to trial, any time would be needed to subpoena witnesses, that it would be allowed, and the witnesses would be subpoenaed.

"The Court: You have two eminent counsel. They have—

"The Defendant: They must be incompetent or something, Judge, your Honor, still and all if they didn't have the knowledge that they couldn't subpoena the witnesses.

"The Court: The Court is satisfied beyond a reasonable doubt—

"The Defendant: Still and all, may I still say something?

"The Court (Continuing): —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

"You gentlemen did a fine job with what you had. You are lucky you saved his life." (R. 165-166)

In answer, Robinson's attorneys stated for the record:

"Mr. Carey: Judge, I know that the Court is busy. Just a few things as to the statements made by the defendant; at a later date if the record is produced, I would like the record to show that the defendant asked me to subpoena Mr. and Mrs. Moore, that I

have talked to Mr. and Mrs. Moore. They can add nothing to this matter on trial and I showed Mr. Robinson what they told me and at that time he said that he didn't wish them. This was after he had requested the Court for the subpoena.

"The Court: The record will so show.

"Mr. McDermid: I would like the record also to show, your Honor, that I personally have spent much time including perhaps two or three dozen telephone calls to psychiatrists; that I have contacted the Illinois Psychiatric Society and all of its officers requesting assistance in this matter. I have asked Dr. Arieff. His office is on Michigan Boulevard. I have not been able to get an analyst to cooperate and work on this matter, and I do not believe in subpoenaing a psychiatrist to testify when I do not know the degree of cooperativeness that he would display which would be helpful to the cause.

"The Court: The record should show that the case was properly prepared and presented by the two attorneys; that they did everything they could, and they are actually good trial lawyers and officers of the Court." (R. 166-167.)

SUMMARY OF ARGUMENT.

The Court of Appeals for the Seventh Circuit reversed the decision of the District Court and remanded respondent's *habeas corpus* action for a hearing and determination of:

1) Whether the respondent was sane at the time of the crime?
2) Whether the respondent was denied due process of law by the failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing on the issue of respondent's competence to stand trial.

It is the position of the petitioner that the question of an accused's sanity at the time of the crime is an ultimate question for the determination of the jury and is outside the jurisdiction of a federal court on a habeas corpus petition.

It is further contended that the failure of the respondent to raise the issue of his competency to stand trial effectively waived this issue, and that on the basis of the evidence before him there was no duty on the trial judge to hold a sanity hearing on his own motion.

Finally, it is submitted that if a hearing on the issue of the Respondent's sanity at the time of the crime is required it should be held in a state court as should any hearing on the ultimate question of his competency to stand trial.

ARGUMENT.

I.

THE QUESTION OF WHETHER AN ACCUSED WAS INSANE AT THE TIME OF THE COMMISSION OF THE CRIME IS A QUESTION OF FACT FOR THE TRIER OF FACT AND ITS DETERMINATION RAISES NO FEDERAL CONSTITUTIONAL QUESTIONS.

It is contended that the portion of the order of the Court of Appeals for the Seventh Circuit which requires the district to hold an evidentiary hearing on the issue of respondent's sanity at the time of the commission of the crime is improper because such a question is one of fact for the trier of fact and raises no federal constitutional questions. It is, therefore, outside the ambit of the jurisdiction of a federal court on a habeas corpus proceeding involving a state conviction.

It is believed that the instant case is the first in which a federal appellate court has indicated that a state court determination that an accused was sane at the time of the crime in question can be reviewed by a federal court.

On the contrary, all other courts of appeal which have considered the question have ruled that the question of an accused's insanity at the time of the commission of a crime cannot be the basis for a writ of habeas corpus.

In *Taylor* v. *United States,* 282 F. 2d 16 (1960), the Court of Appeals for the Eighth Circuit in the case of a federal prisoner brought under 28 U. S. C. 2255 ruled that insanity at the time of the crime is not cognizable under that section. This aspect of the *Taylor* case has been cited with approval in the following later cases decided by

ie Eighth Circuit: *Burrow* v. *United States*, 301 F. 2d 42 (1962), *cert.* denied 371 U. S. 894; *Roe* v. *United tates*, 325 U. S. 556 (1963); *Wheeler* v. *United States*, 40 F. 2d 119 (1965); and *Richards* v. *United States*, 342 . 2d 962 (1965).

In *Bishop* v. *United States*, 223 F. 2d 582 (1955), the ourt of Appeals for the District of Columbia the peti- oner raised issues as to both his sanity at the time of the ommission of the crime and at trial. The court denied oth grounds saying with respect to the issue of insanity the time of the crime, at page 584:

> "While Bishop makes some reference to insanity at the time of the commission of the crime which would be a defense to the indictment, this is not the burden of the motion to vacate. The issue of insanity as a defense is presentable upon trial and appealable if error has been made with respect to it, and a motion to vacate under Section 2255 cannot be used as a substitute for an appeal. Therefore, an alleged insanity at the time of the commission of a crime cannot be used as the basis for a motion under Section 2255."

This Court granted *certiorari* and in a *per curiam* de- sion reported at 350 U. S. 1961 held that "the judgment vacated and the case remanded to the District Court for hearing on the sanity of the petitioner at the time of his rial." Thus this Court by remanding the case only for a earing on the issue of the petitioner's sanity at the time f the trial *sub silencio* affirmed the determination that he ad no right to a hearing on the issue of his sanity at the me of the crime.

If the issue is not cognizable under 2255, *a fortiori*, it is ot cognizable under 2254.

The Court of Appeals for the District of Columbia fol- owed its *Bishop* decision, after the action of this Court,

by rejecting an application by a federal prisoner convicted of five acts of sodomy which alleged that the acts themselves showed they were the product of a mental disease in *Carter* v. *United States,* 283 F. 2d 200 (1960).

There are also older cases decided by certain other courts of appeal which hold that neither insanity at the time of the crime nor at the time of the trial are cognizable in a federal *habeas corpus* proceeding. To the extent such cases indicate that insanity at the time of the trial is not cognizable, they have in most cases been superseded by later decisions of the circuits involved. It is contended, however, that insofar as they hold insanity at the time of the crime outside the ambit of federal *habeas corpus,* they still represent the law of the circuit in question. Included among these cases are: *Hahn* v. *United States,* 178 F. 2d 11 (10th Cir. 1949); *Nunley* v. *United States,* 283 F. 2d 651 (10th Cir. 1960); *Hall* v. *Johnson,* 86 F. 2d 821 (9th Cir. 1936); *Whelchel* v. *McDonald,* 176 F. 2d 260 (5th Cir. 1949) aff'd, 340 U. S. 122.

Thus it is submitted that the portion of the order of the Seventh Circuit is in conflict with the law established in at least five different circuits. It is also inconsistent with the decisions of this Court in *Leland* v. *Oregon,* 343 U. S. 790 and the *Bishop* case, 350 U. S. 961.

In *Leland* v. *Oregon,* the petitioner was charged with first degree murder. He pleaded not guilty and gave notice of his intention to prove insanity. He was found guilty by the jury. His principal contentions in this Court were that the Oregon statutes which required a defendant to prove his insanity beyond reasonable doubt and which precluded the application of the "irresistible impulse" test deprived him of due process of law. It was held that it was not a violation of due process for a state to adhere

to the McNaughton "right and wrong" test for insanity, nor to require that a defendant prove his inability to know the difference between right and wrong with respect to the conduct in question beyond a reasonable doubt.

If the decision of a state court on the issue of a person's sanity at the time of the crime could be reviewed by a federal court as a question of federal constitutional law, the constitution must require certain tests as to what constitutes insanity and a specification of the burden of proof on the issue. These federal constitutional requirements would then be binding on the states. The question of insanity at the time of the crime would then no longer be a subject on which the various states and federal courts of appeal could adopt different tests. The decision in the *Leland* case which permits the states to adopt different tests for insanity and different rules on the burden of proof on the issue conclusively establishes that this question is not governed by the federal constitution and that it is, therefore, outside the ambit of the jurisdiction of a federal court reviewing directly or by collateral attack the validity of a state conviction.

This conclusion is reinforced by the decision of this Court in *Whelchel* v. *McDonald,* 340 U. S. 122. In that case the petitioner while on active duty with the army in Germany was convicted by a general court martial for the rape of a German girl. A death sentence was originally imposed but was subsequently reduced to a term of years. On federal habeas corpus the main issue was the insanity of the petitioner at the time of the crime. This Court said at page 124:

> "We put to one side the due process issue which respondent presses, for we think it plain from the law governing court martial procedure that there must be afforded a defendant at some point of time an

> opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts."

While we do not contend that the scope of federal habeas corpus is the same in cases involving state convictions as in those involving military courts martial, there are close similarities. See *Burns* v. *Wilson,* 346 U. S. 137, at pp. 140-142. Since this Court has indicated in the *Whelchel* case that the basic demands of due process are met if the opportunity to raise the defense of insanity at the time of the crime is accorded a defendant, it is contended that the same rule should be applicable on habeas corpus from a state conviction.

While "basis fairness" may require that a person not be convicted of a crime committed while he is insane, the same consideration applies with equal force to the proposition that a person should not be convicted for a crime of which he is innocent. Yet the question of ultimate guilt or innocence is left to the jury or trier of fact in a criminal prosecution and due process dictates only that he be given the opportunity to prove his innocence. In like manner the question of a person's mental competency at the time of the crime is a question determined by the trier of fact and there is no more reason why that question should be retried in the context of a federal habeas corpus petition than the question of guilt or innocence. The *Whelchel* case establishes this proposition with regards to courts-martial and it is submitted that the same rule should govern state convictions.

Thus the principle that the question of a person's mental competency at the time of the crime is outside the jur-

isdiction of the court in a federal habeas corpus proceeding is established by the decisions of five circuit courts of appeal; the decisions of this Court in *Bishop* v. *United States,* 350 U. S. 961; *Leland* v. *Oregon,* 343 U. S. 790, and *Whelchel* v. *McDonald,* 340 U. S. 122; and sound logic. Its reaffirmance by this Court in this case is urged.

The Court of Appeals for the Seventh Circuit stated that *Smith* v. *Baldi,* 344 U. S. 561, establishes that "The conviction by a state court of a person for an alleged crime committed while insane violates due process of law under the Fourteenth Amendment." It is contended that *Smith* v. *Baldi* does not stand for that proposition.

In the *Smith* case the petitioner had been indicted for murder in a Pennsylvania court. At the arraignment he appeared without counsel. A lawyer in the court room at the request of the judge advised him to plead not guilty. Subsequently, a lawyer was appointed who, together with the district attorney and a judge, agreed that a plea of guilty would be substituted so that the state could present its evidence that the crime was first degree murder and petitioner's counsel could have additional time in which to procure out-of-state evidence that petitioner was insane. The court found he was not insane at the time of the crime or any time thereafter and sentenced him to death.

On appeal the State Supreme Court affirmed the conviction. Subsequently, the denial of a federal habeas corpus petition was affirmed by the Court of Appeals for the Third Circuit. A habeas corpus petition was then filed in the State Supreme Court and was denied and *certiorari* was denied by this Court. A second petition was then filed in the federal district court. It was denied and again the Third Circuit affirmed. *Certiorari* was then granted.

The first question raised and the one which prompted this Court to grant the writ was the question of the effect

of the former denial of the writ of *certiorari* from the State Supreme Court habeas corpus action.

> "As the effect of a denial of *certiorari* was then in doubt we granted this petition primarily to determine its effect." *Smith* v. *Baldi,* 344 U. S. 561 at 565.

After holding that such a denial was "without substantive significance", the Court considered the due process arguments of the petitioner. These appear to be: (1) that State should not have allowed him to plead guilty without first adjudicating the question of his competency; (2) that he should not have been permitted to plead to a capital offense without being afforded the technical services of a psychiatrist; (3) that an insane person cannot be executed, and (4) that the district court committed error in not holding a plenary hearing for the determination of his sanity.

After holding that the first three issues showed no violation of due process, this Court, on the fourth issue, held that there was no need for a plenary hearing under *Brown* v. *Allen,* 344 U. S. 433, because the question of his sanity at the time of the crime was fully canvassed in the state court proceedings.

Although this determination could be interpreted as a holding that the issue was cognizable on federal habeas corpus but that in that case an evidentiary hearing was not required because the issue had been fully canvassed in the state court proceeding, it is contended that such an interpretation is not required, and in the light of the extensive authority to the contrary should not be adopted. Rather, it is submitted that this aspect of the *Smith* case should be merely interpreted to mean that in light of this Court's finding that the issue had been fairly decided in the state court it was not required to pass on the question of whether the contention itself raised an issue cognizable

on federal habeas corpus. In the absence of an express holding on the jurisdictional question, it should not be implied that this Court intended to overrule the existing contrary authority *sub silencio*. Indeed, the *Bishop* case, 223 F. 2d 585 (1952) rev'd. on other grounds, 350 U. S. 961, and the *Taylor* case, 282 F. 2d 16 (1960) which were both decided after the *Smith* decision was reported, show that at least two courts of appeal have not interpreted it in that manner, and the decision of this Court in the *Bishop* case, 350 U. S. 961, reinforces the correctness of the interpretation of those courts.

In conclusion, it is submitted that the issue of insanity at the time of the crime, like the question of the ultimate guilt or innocence of the defendant, is an ultimate question for the determination of the jury and is outside the jurisdictional scope of inquiry on federal habeas corpus. Therefore, that aspect of the decision of the Court of Appeals for the Seventh Circuit remanding the case to the District Court for a determination of that issue is erroneous and should be reversed.

II.

THE ISSUE OF THE COMPETENCE OF THE RESPONDENT TO STAND TRIAL WAS WAIVED BY THE FAILURE TO RAISE IT AT THE TRIAL COURT, AND THE EVIDENCE PRESENTED TO THAT COURT FAILED TO RAISE A BONA FIDE DOUBT OF SANITY SO THAT THE JUDGE SHOULD HAVE RAISED IT ON HIS OWN MOTION.

The decision of the Court of Appeals for the Seventh Circuit in this case, on the issue of the respondent's competence to stand trial, states:

> "The district court should also determine upon the hearing whether Robinson was denied due process by

reason of the failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial."

The Illinois law on the question of how the issue of competence at the time of trial of a person accused of a crime may be raised was stated by the Illinois Supreme Court in *People* v. *Shrake*, 25 Ill. 2d 141 at page 143 as follows:

> "And while we have held it is the duty and responsibility of a defendant or his counsel to raise the question of whether an accused is sane at the time of trial, (*People* v. *Cloggett*, 22 Ill. 2d 471; *People* v. *Maynard*, 347 Ill. 422), we have further held that if, before or during trial, facts are brought to the attention of the court, either by its own observation or by suggestion of counsel, which raise a *bona fide* doubt as to a defendant's present sanity, it becomes the duty of the court not to proceed until a jury has been impaneled and the doubt removed by a sanity hearing."

In the instant case, although it was "the duty and responsibility of the defendant or his counsel to raise the question" of his sanity at the time of the trial, they failed to do so. The respondent was represented by counsel and they clearly were aware of the possibility of raising that issue because the question of his sanity at the time of the crime was raised as his principal defense. This clearly deliberate choice not to interject this issue into his trial must be deemed a waiver of that question. The scope of waiver in federal habeas corpus was recently restated by the Court in *Fay* v. *Noia*, 372 U. S. 391, at page 439:

> "The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U. S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a

> habeas applicant, after consultation with competent counsel or otherwise understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state court refused to entertain his federal claim on the merits—though of course only after the federal court has satisfied itself by holding a hearing or by some other means, of the facts bearing on the default."

Here the respondent, who had the advice of competent counsel, failed to raise this issue with regard to his trial. As previously established, the fact that insanity at the time of the crime was raised establishes that the failure to raise the issue of competence to stand trial was a deliberate choice. Because of the extent to which the respondent participated in the trial himself, this must be deemed his choice as much as that of his attorneys. The reasons which led to this choice are purely in the area of conjecture. Perhaps it was because the respondent knew that if he was successful it would only delay the trial until he was restored to sanity and he would be committed to an appropriate institution until that time; perhaps because he believed he could later be freed on that ground on habeas corpus if he was convicted and therefore he had nothing to gain by raising it; but more likely it was because neither he nor his counsel believed that he was incapable of understanding the charges against him and aiding his counsel in defending against them. Indeed, in this regard it should be noted that his counsel in his closing argument stated that he believed Robinson was at that time having a lucid interval, although he also said that he did not believe his lucidity bore on the question of whether he

was legally sane at the time of the crime or the time of the trial. (R. 162) In any event, his failure to request a sanity hearing clearly was a "deliberate by-passing of state procedures," of which the federal district court was capable of satisfying itself by means of examination of the trial record which was before it at the time of the decision.

But the fact that the respondent waived this issue by his failure to raise it does not completely answer the issue because of the second aspect of the Illinois law on the subject—the rule that the trial judge must raise it on his own motion if he has any *bona fide* doubt on the issue. This is the point on which the Court of Appeals for the Seventh Circuit believed there might have been a denial of due process. Its order remanded the case for a determination if there was a denial of due process "by reason of the failure of the trial court on its own motion to impanel a jury and conduct a sanitary hearing upon his competence to stand trial."

While it is contended that the fact that the respondent failed to raise the issue waived it as a matter of Federal law and that the question of whether under Illinois law the judge should have had a *bona fide* doubt raises no due process issue, it is further contended that even on the basis of Illinois law the facts clearly show no ground on which the trial judge should have had such a *bona fide* doubt.

The only evidence before the trial judge in 1959 in any way indicating the possibility of present insanity was the fact that respondent had once been committed to Kankakee State Hospital as insane in 1951 and the testimony of four lay witnesses who testified they believed him insane and incapable of distinguishing between right and wrong.

However, the medical record from Kankakee stated that the respondent when admitted had been drinking heavily

and described classical symptoms of delerium tremens. He was adjudged fully recovered when he was discharged (R. 164-165, 161).

The gist of the testimony of the lay witnesses was that a brick had fallen on Robinson's head when he was seven and that he acted somewhat peculiar afterwards, that he once kicked a hole in a family bar when he was refused money by his mother, that he frequently was sullen and complained of headaches, that he once had a serious fight with his wife, that he was nervous, that he often walked abruptly from his work, and that he sometimes appeared "glassy-eyed" or in a daze. Clearly, none of this testimony had any bearing on the issue of whether he understood the nature of the charges against him and could cooperate with his counsel.

More serious is the fact that he had killed his child and attempted to commit suicide; however, since he was convicted for this crime in 1953, it follows he was unable to establish that he was insane at that time.

On the other hand, it was stipulated that if Dr. William H. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called as a witness, he would testify that he had examined Robinson approximately two months earlier and at that time he knew the nature of the charges against him and was able to cooperate with counsel. Furthermore, the extended vis-a-vis colloquies he had with the court gave the trial judge an unusually clear opportunity to evaluate the defendant's demeanor and to see that he was able to understand the charges against him and cooperate with counsel. The Supreme Court of Illinois discussed the effect of the colloquies as follows:

> "In the latter respect, the record reflects several instances where defendant displayed his ability to as-

sist in the conduct of his defense in a reasonable and rational manner. Typical instances of when defendant displayed mental alertness, as well as understanding and knowledge of the proceeding, appear in his remarks to the court as follows: 'Your honor, they were on the State's witness list and the State said they have several witnesses. They produced two. For what reason, I don't know, but I am on trial here and I would like to be given every consideration, and I would like the court to be adjourned until tomorrow morning—to give me time to confer with counsel for the calling of witnesses.' Again, when discussing witnesses with the court, defendant said: 'Well, the police are contending that the clothes they found in Moore's apartment was mine. That is the reason at the beginning of the trial, I asked the attorney to have a pre-trial preliminary to determine admissibility and validity of the evidence the State was intending to use against me.'

"Under all the circumstances, we are of the opinion that the court violated no duty, and denied defendant no constitutional right, when it did not, of its own volition require a sanity hearing." *People* v. *Robinson,* 22 Ill. 2d 162, at page 168, 174 N. E. 2d 820 at page 823.

We contend, therefore, that, if the issue was not fully waived, on the basis of the evidence before him, the trial judge violated no constitutional right of the respondent when he did not, on his own motion, require a sanity hearing.

III.

ANY HEARING REQUIRED ON THE ISSUE OF RESPONDENT'S COMPETENCY AT THE TIME OF TRIAL OR HIS SANITY AT THE TIME OF THE CRIME SHOULD BE HELD IN AN APPROPRIATE STATE COURT.

Under the present concept of federal habeas corpus, state remedies must first be exhausted before the federal court will assume jurisdiction. Once that court does assume jurisdiction, normally all further proceedings until it is determined whether the defendant's constitutional rights have been violated are conducted in a federal court. However, a recent exception to this practice has been established by the decision of this Court in *Jackson* v. *Denno,* 378 U. S. 368, under which a question relating to the denial of a defendant's constitutional rights is to be remanded for a hearing in the state courts where those courts have not conclusively established the factual questions underlying the asserted denial of constitutional rights. Under this rule the power of a federal court to hold an evidentiary hearing and make an independent factual determination of constitutional issues once decided by a state court is not questioned. Rather it is believed that this new practice is based on the concept of comity which underlies the exhaustion of state remedies' requirement of 28 U. S. C. 2254 (*Fay* v. *Noia,* 372 U. S. 391, 419-420) and which dictates that a state court should first hold the appropriate evidentiary hearing where there has never been a conclusive factual determination by the state court even though the state remedies may be technically exhausted.

The origin of this concept lies in the opinion of this Court in *Rodgers* v. *Richmond,* 365 U. S. 534, a federal habeas corpus case involving the validity of a conviction ren-

dered by the state courts. This Court determined that the state trial court had used a test for the determination of the voluntary nature of a confession which was invalid under the Constitution. Rather than remanding the case to the district court for the determination of the voluntariness of the confession, the Court remanded the case to the state court for a retrial of the defendant under an appropriate constitutional standard. The Court said at pages 547-548:

> "A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment."

This case in turn provided the basis for *Jackson* v. *Denno,* 378 U. S. 368, which extended the concept to its present status. The *Jackson* case was also a federal habeas corpus proceeding involving a state conviction, in which the issue was the constitutionality of the New York procedure by which the admissibility of a confession was determined. Under that procedure the judge would make a preliminary determination with regard to the admissibility of a confession. If under no circumstances it could be considered voluntary, it was his duty to exclude it, but if reasonable men could differ on the question, he was required to submit the question to the jury. The Court ruled this procedure unconstitutional and held that there must be an independent judicial determination of the voluntary character of every questioned confession. Since the jury had the question of the admissibility of Jackson's confession left to it for determination, his constitutional rights were violated. This Court ruled that Jackson was not entitled to a new trial but merely to a hearing on the voluntary nature of his confession. If it was not voluntary,

a retrial would be necessary, but if it was, his conviction could stand. Furthermore, it was held that this hearing should be held in the state rather than the federal courts.

The Court said at 378 U. S. pages 373-374:

> "It is New York, therefore, not the federal habeas corpus court, which should first provide Jackson with that which he has not yet had and to which he is constitutionally entitled—an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession."

Similarly, in the instant case if this Court should rule that Robinson is entitled to either or both of the hearings specified in the order of the Court of Appeals, they should be held in the state courts. On the issue of insanity at the time of the crime, the only state determination on this question was the ultimate decision of the judge, in his capacity as trier of fact, that the respondent was guilty. The Illinois Supreme Court has never fully reviewed the evidence on this point but merely held that he never overcame the presumption of sanity. (*People* v. *Robinson,* 22 Ill. 2d 162, 179 N. E. 2d 820.) The situation here is very similar to that in the *Jackson* case where the only determination on the issue of the admissibility of the confession was that made by the jury, the ultimate trier of fact in that case.

On the issue of respondent's competency at the time of the trial, if, as indicated by the opinion of the Court of Appeals, this question only goes so far as a determination of whether the trial judge should have granted a sanity hearing on his own motion, the question is somewhat different. That determination could properly be made by the federal district court on the basis of the record. If, however, that court should determine that due process was denied by that failure, then as in *Jackson,* the cause should

be remanded to the state court to hold what was constitutionally required, a sanity hearing. If on such a hearing it is determined that Robinson was sane at the time of the trial, the conviction should stand. If, however, it is determined that he was not competent at that time, a new trial would be required.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be reversed and the order of the District Court dismissing the petition for a writ of habeas corpus should be reinstated.

Respectfully submitted,

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